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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1905.

No. 236.

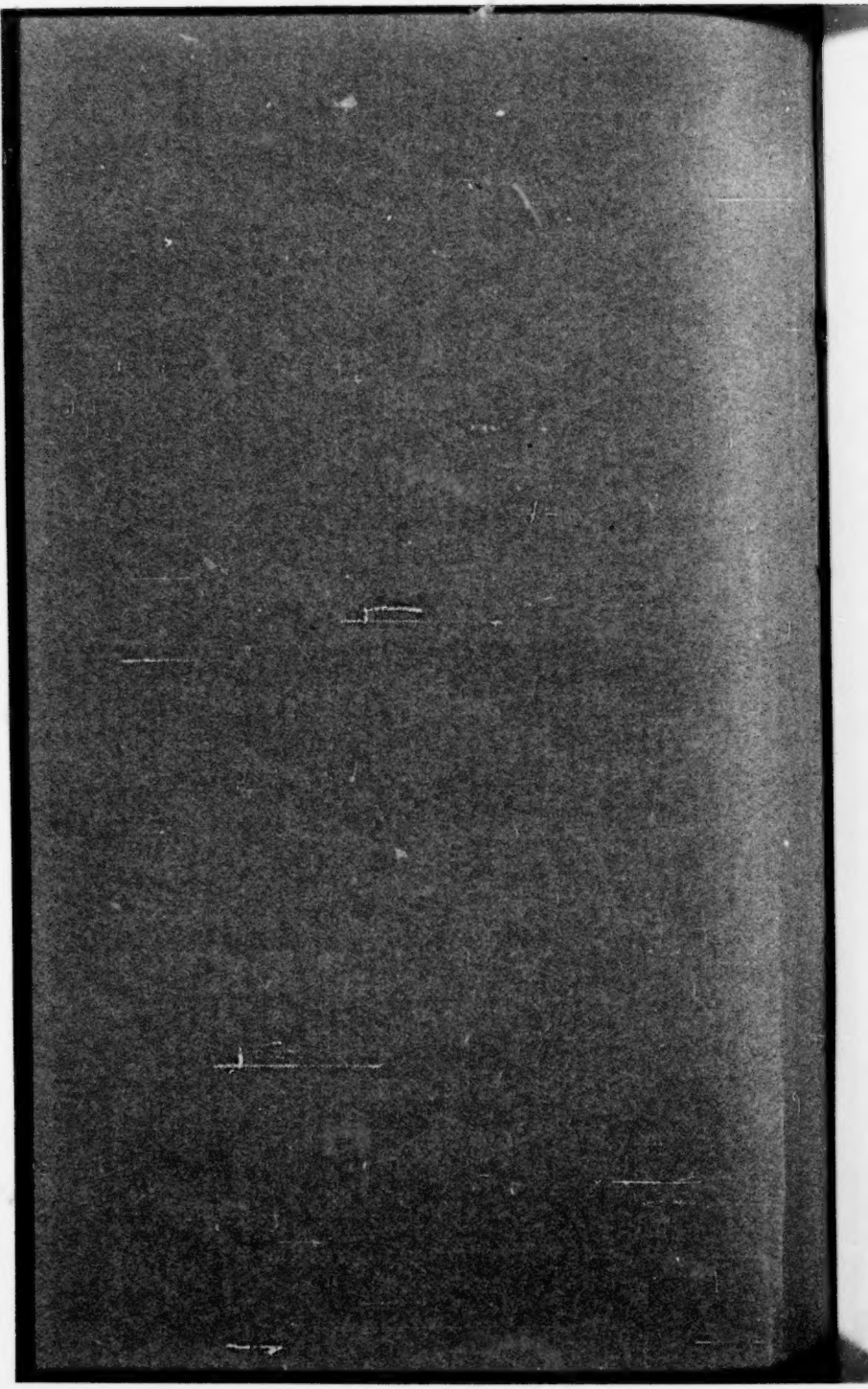
THOMAS O'CONOR, PLAINTIFF IN ERROR

vs.

THE STATE OF TEXAS.

IN ERROR TO THE SUPREME COURT OF TEXAS.

BRIEF OF PLAINTIFF IN ERROR.



SUPREME COURT OF THE UNITED STATES,

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No. 236.

THOMAS O'CONOR, PLAINTIFF IN ERROR

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Brief statement of the nature and result of the case.

The State of Texas, through its attorney general, entered suit in the district court of Travis County, against Thomas O'Conor, the plaintiff in error, to recover 19,410 13–100 acres of land situated in Webb County, Texas. This suit was brought pursuant to the Act of the Legislature of Texas, approved September 9th, 1901. The provisions of the Act applicable to this case are sections first and eleven, which are in the following language, viz: Section 1. "That any person or persons who may be the original grantee, heir, legal assign, or in any manner the owner or claimant of any grant, tract or survey of land, or part thereof, situated between the Nueces and Rio Grande rivers and below a line drawn from the Northern boundary of Webb County to the mouth of Moros Creek where the same empties into the Nueces river and emanating, or claimed to have emanated, from the Spanish or Mexican governments, and having its origin at such time as to be, and being within the protection guaranteed by the treaty of Guadalupe Hidalgo entered into between the United States and Mexico, and proclaimed on the 4th day of July, A. D. 1848, may file a petition in the district court of Travis County, Texas, against the State of Texas as defendant for the confirmation of the title thereto, and also for the adjudication of his, her or their title, right interest or claim therein or thereto, as against the State; which petition shall be filed with the district clerk of the county in which suit is brought, at least twenty days before the time of holding the next succeeding term of the district court in and for such county, and shall contain a full description of the grant, tract or survey of land claimed, setting forth particularly its situation, boundaries

and extent, and the ownership, right, interest or claim of the plaintiff or plaintiffs, and each of them in and to said land, and the source from which said ownership, right, interest or claim emanates, and shall accompany and file with such petition the titles or evidences of titles, or right, or true copies thereof, and if in a foreign language in addition true translations thereof, under which the same is held or claimed, or if such ownership, right, interest or claim of plaintiff does not have its origin in, or is not based upon such written evidences of title, right, interest or claim, then a statement in writing, setting forth substantially the facts upon which said ownership, right, interest or claim is based and of which it consists; and the district court shall thereafter at a regular term thereof investigate the same, and try said cause in accordance with the laws of nations, the laws, usages and customs of the government from which such said ownership, right, interest or claim emanates or is derived, and the constitution, laws and treaties of the United States of America, and of this, the State of Texas, and the principles of equity, so far as the same are applicable, and if in accordance therewith, the plaintiff (or plaintiffs as the case may be) shall by a preponderance of the testimony show that he is entitled thereto, shall give judgment in favor of such plaintiff or plaintiffs, against the State in favor of and in confirmation of the title to said land, describing the same by metes and bounds, or in favor of the State against such claimant or claimants, as the facts may warrant." Section II. "The Attorney General of this State is hereby directed and required to institute and prosecute, in the name of the State of Texas, such suits as may be necessary to recover from the person or persons in possession thereof or claiming title thereto, all lands which are held or claimed under titles emanating from the Spanish or Mexican governments where no valid evidence of such grants are to be found in the records or among the files of the General Land Office; and also such suits as may be necessary to determine the exact location and boundaries of such lands, where the evidence on file in the General Land Office does not sufficiently identify the land claimed; and such suits shall be brought, prosecuted and tried in the district court of Travis County, Texas." The petition of the State filed in the trial court alleged that the defendant therein, plaintiff in error, was a resident of the City of Nuevo Laredo in the Republic of Mexico. Before answering to the merits in the trial court the defendant, plaintiff in error, filed his petition for the removal of said cause to the Circuit Court of the United States upon the ground that defendant was at the time of the commencement of said suit and the presentation of his petition an alien

and subject of the United Kingdom of Great Britain and Ireland and a resident of the City of Nuevo Laredo, in the State of Tamaulipas, in the Republic of Mexico; and that the matters in the dispute in said suit, and for which it was brought, exceed in value two thousand dollars, exclusive of costs. Upon the hearing of said petition for removal the plaintiff, excepted to the same upon the ground that it appears therefrom "that the State of Texas is the plaintiff in the cause sought to be removed and the law does not authorize the transferring of a case in which a Sovereign State is plaintiff to a United States Court; said State not being a citizen of any other state." The trial court sustained said exception and entered an order refusing the application and petition for removal. Plaintiff in error then filed his plea to the jurisdiction of the court which was overruled. Thereupon he entered the following pleas, viz:

1st.

Plea of not guilty and general denial by which he claimed the title to and possession of said land.

2nd.

A claim of title under and by virtue of a grant from the government of Spain to Joaquin Galan, duly made in the year A. D. 1767, or about that time, which grant was recognized and confirmed by a judgment of the district court of Webb County, Texas, duly given and made on the 13th day of March 1872 in a suit for confirmation of title, wherein Daniel Ruggles was plaintiff and the State of Texas defendant, instituted and prosecuted under and by virtue of an Act of the Legislature of Texas approved February 11th. 1860, entitled An Act to ascertain and adjudicate certain legal claims for land against the State situated between the Nueces and Rio Grande rivers.

3d.

A claim of title under and by virtue of the Act of the Legislature of the State of Texas approved April 4th 1881, entitled "An Act to authorize and require the issue of the patents to land situated between the Rio Grande and Nueces rivers, the titles to which have been confirmed under the Act of February 11th. 1860," which act of April 4, 1881, ratified and confirmed said judgment of the district court of Webb County of March 13th 1872, and which operated as a grant from the State to plaintiff in error.

4th.

A claim of title by adverse possession, under claim of right and title, for a period of more than ninety-six years by plaintiff in error and those under whom he claims; which long and peaceable possession raises the presumption of a grant from the sovereignty of the soil.

5th.

A claim of title by estoppel; that the State of Texas is estopped by her long acquaintance in the said judgment of the district court of Webb County of March 13th 1872, without any action for its reversal, and by her acceptance from plaintiff of all State taxes assessed by State authority against the land in dispute amounting to the sum of $4,500.00.

6th.

A claim of the title under and by virtue of the judgment of the district court of Webb County, Texas, rendered on the 8th. day of January 1862 in a suit for confirmation of title in the suit entitled Daniel Ruggles vs. The State of Texas, by which judgment it was recited and decreed that the land in dispute was donated and granted to the settlers of the town of Palafox about the year 1810 and that plaintiff in error had acquired and held the title of the said grantees.

7th.

A claim of outstanding title in the settlers of the said town of Palafox or their heirs and assigns as evidenced by the recitals in said judgment of the district court of Webb County of January 8th. 1862 rendered in the said cause of Daniel Ruggles vs. The State of Texas, (Trans. p. 6 to 11.)

The cause was submitted to the trial court for its decision upon the matters of fact, as well as of law, and on the 20th day of June 1902, the court rendered a judgment in favor of plaintiff, the State of Texas, overruling the plea to the jurisdiction of the court, annulling any title of the plaintiff in error to said land and decreeing and vesting the title to the same in the State of Texas, (Trans. p. 11.)

From this judgment plaintiff in error prosecuted his appeal to the court of civil appeals of the State of Texas, which court duly rendered a judgment reversing said judgment of the trial court and rendering judgment in favor of plaintiff in error for the title to and possession of said land, but holding in its opinion that the trial court did not err in refusing to order

the removal of said cause to the Circuit Court of the United States, (Trans. p. 46.) From this judgment of the court of civil appeals, the State of Texas prosecuted a writ of error to the Supreme Court of the State, which court reversed the judgment of the court of civil appeals and rendered a judgment for the State of Texas for the title and possession of said land (Trans. p. 67.) In its judgment overruling the motion for a rehearing the Supreme Court held that the trial court did not err in refusing to order the removal of said cause to the Circuit Court of the United States, (Trans. p. 80.) To review this judgment of the Supreme Court, plaintiff in error prosecutes this writ of error.

The first and second assignments of error being of similar import and involving the same proposition will be considered together

First Assignment of Error.

The Supreme Court of Texas erred in holding and deciding in its judgment overruling the motion for a rehearing that the application of plaintiff in error for the removal of said cause from the district court of Travis County to the United States Circuit Court was properly denied by the said district court, which was the trial court in the case.

Second Assignment of Error

The said Supreme Court erred in not remanding said cause to the said trial court and directing that it be transferred and removed to the proper United States Circuit Court, as prayed for in the petition for removal duly filed in said trial court by plaintiff in error.

First Proposition Under First and Second Assignment of Error.

An action at law brought in her own court by one of the States of the United States as plaintiff, against a non-resident alien, as defendant, is removable from the State Court to the Circuit Court of the United States upon the filing by the defendant of the petition and bond required by law.

Statement

Before answering to the merits in the trial court the defendant filed a proper petition and bond therein for removal of said cause to the Circuit Court of the United States, (Trans. p. 2.) The plaintiff excepted to the petition for removal on the ground "that the State of Texas is the plaintiff in the

cause sought to be removed, and the law does not authorize the transferring of a case in which a sovereign state is plaintiff to a United States Court; said state not being a citizen of any other state." The court sustained this exception, (Trans. p. 5.) The defendant excepted to the judgment of the court sustaining said exception (Trans. p. 6.) Upon the trial of the cause judgment was rendered in favor of plaintiff the, State of Texas, for the title and possession of the land, (Trans. p. 11.) The defendant appealed from the judgment of the trial court to the court of Civil Appeals of Texas, which sustained the action of the trial court in refusing to order the removal of said cause to the Circuit Court of the United States, but rendered judgment in favor of the defendant for the title and possession of said land, (Trans. p. 46.) The State of Texas appealed from this judgment to the Supreme Court of Texas, which reversed the judgment of the Court of Civil Appeals, and rendered judgment in favor of the State for the title and possession of the land, (Trans. pp. 67, 71.) The defendant, Thos. O'Conor, filed in the Supreme Court his motion for a rehearing, urging amongst other things, that the Supreme Court having the entire record before it, erred in not sustaining the first assignment of error filed by the defendant in the trial court and in not ordering that said cause be removed to the proper Circuit Court of the United States for trial, (Trans. p. 71.) The Supreme Court overruled this motion for rehearing, holding that the case was not one that could be removed to the Circuit Court of the United States under the law, (Trans. p. 80.)

Authorities

Constitution of the United States, Article 3, Section 2. Judiciary Act of the Congress of the United States, of September 24, 1789, Section 11 and 12. Judiciary Act of March 3, 1875, Judiciary Act of Congress of the United States, approved March 3, 1887, as corrected by the Act of Congress, approved August 13, 1888, Section 1 and 2.

Revised Statutes of the United States, Section 639.

The State of Texas v. Lewis et al, 14 Fed. Rep. 65. Also same case, 12 Fed. Rep. 1.

Argument.

It does not appear that the Supreme Court of the United States has ever decided the question as to whether an alien defendant when sued by a State in her own court, can remove the cause to the Circuit Court of the United States. There

can be no question that the judicial power of the United States extends to such a suit under Section 2, Article 3, of the constitution, which provides as follows: "The judicial power shall extend to all cases affecting ambassadors, other public ministers, and consuls; to controversies between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction." In order to give effect to this provision of the constitution, the Judiciary Act of September 24, 1789, confers concurrent jurisdiction of such a suit upon the Circut Courts of the United States in the following language: "Section 2. That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state." It is evident also that such suit could be removed to the Circuit Court of the United States under the Judiciary Act of 1789 which provides in Section 12 as follows: "That if a suit be commenced in a State court against an alien or by a citizen of a state in which the suit is brought against a citizen of another state &c.," the defendant could have the suit removed to the Circuit Court of the United States. This Section 12 of the Act of 1789 is embraced in Section 639 of the Revised Statutes of the United States which in terms and effect provides for removal in cases of this kind. Have these provisions for the removal of causes of this kind been repealed by the Judiciary Act of March 3, 1875, or the Judiciary Act of March 3, 1887, as corrected by the Act of August 13, 1888, in view of the provision of the federal constitution conferring jurisdiction upon the federal courts of controversies between a state and an alien. There is no express repeal in any of these Acts of any specified previous Acts; the repeal being in each case only of all Acts and parts of Acts in conflict with the provisions of this Act.

Subdivision first of Section 639 of the Revised Statutes of United States provides that a suit brought in a State Court can be removed. This provision does not conflict with the provision in Section second of the Judiciary Act of March 3, 1875, that controversies in a State Court between citizens of a state and alien can be removed. The only change in reference to the removal of such controversies made by the Act of March 3, 1887, as corrected by the Act of August 13, 1888, was the change in the value of the amount in controversy from

$500 to $2,000, and the insertion of the provision that only the defendant could have the right to demand a removal.

Such statutes as the Judiciary Acts of Congress, as well as the provisions of the Revised Statutes of the United States, should be so construed as to give effect to the provisions of Section 2, Article 3 of the federal constitution giving jurisdiction to the federal courts of controversies between a state and an alien, whenever such construction is possible, in order that the alien may have some protection of his property rights from the invasion of them by a state by judicial process. The case at bar itself furnishes an impressive example of such an invasion.

Second Proposition Under the First and Second Assignments Of Error.

The said Act of the Legislature of Texas approved September 9th, 1901 under which this suit was brought and the petition of defendant in error filed in the trial court show that this is a suit arising under the laws of the United States and the treaty of Guadalupe Hidalgo entered into between the United States and Mexico; and being such a suit the petition of plaintiff in error for removal to the Circuit Court of the United States should have been granted.

Statement.

The sections of the Act of the Legislature of Texas, approved September 9th, 1901, applicable to this case, are set out in full on page 12 of this brief. The petition of the plaintiff filed in the trial court described the land in controversy as being situated in Webb County, Texas, on the Rio Grande river about 37 miles north 37° west from the town of Laredo, Trans. p. 1. The land lies "below a line drawn from the northern boundary of Webb County to the mouth of Moros Creek where the same empties in the Nueces river."

Authorities.

Acts of the Legislature of Texas, First Special Session of 1901, p. 4.
Chadman v. Goodnow, 123 U. S. R. 540.
Lytle v. Arkansas, 22 How. 193.
Marlin v. Hunter, 1 Wheaton, 304.
Cohens v. Virginia, 6 Wheaton, 264.
Hickie v. Starke, 1 Peters, 94.
Covington & L. Turp Co. v. Landford, 164 U. S. R. 578.
Louisville & N. R. Co. v. Louisville, 166 U. S. R. 709.
F. G. Oxley Stove Co. v. Butler Co., 166 U. S. R. 648.

Argument.

This case was brought by the State through its attorney general, under and by virtue of the Act of the Legislature of the State of Texas, approved on the 9th day of September, 1901. Section first of this act provides as follows: "Any person or persons who may be the original grantee, heir or legal assign or in any manner the legal owner or claimant of any grant, tract or survey of land or any part thereof, situated between the Nueces or Rio Grande rivers, and below a line drawn from the northern boundary of Webb county to the mouth of the Moros creek where the same empties into the Nueces river, and emanating or claimed to have emanated from the Spanish or Mexican government, and having its origin at such time as to be and being within the protection guaranteed by the treaty of Guadalupe Hidalgo entered into between the United States and Mexico, and proclaimed on the 4th day of July, A. D. 1848, may file a petition in the district court of Travis county, Texas, against the State of Texas, as defendant for the confirmation of title thereto, and also for the adjudication of his, her, or their title, right and interest or claim therein or thereto as against the State, etc., and the district court shall thereafter at a regular term thereof investigate the same, and try said cause in accordance with the laws of Nations, the laws, usages and customs of the government from which said ownership, right, interest or claim emanates or is derived, and the constitution, law and treaties of the United States and of this, the State of Texas, and the principles of equity, as far as the same are applicable," etc.

Section eleventh of said Act provides as follows: "The Attorney General is hereby directed and required to institute and prosecute in the name of the State of Texas such suits as may be necessary to recover from the person or persons in possession thereof all lands which are held or claimed under titles emanating from the Spanish and Mexican governments where no valid evidence of such grants are to be found in the records or among the files of the general land office, &c., and such suits shall be brought, prosecuted and tried in the district court of Travis county." The petition filed by the Attorney General in the district court of Travis county in this suit, which is an action of trespass to try title, described the land in controversy as 19,410 13-100 acres of land situated in Webb County, Texas, on the Rio Grande river about 37 miles north 37° west from the town of Laredo, giving the metes and bounds of the same, and alleged that plaintiff in error was in possession of the same and claimed the same adversely to the state and prayed for judgment in favor of the state against

him for the title and possession thereof. The plaintiff in error pleaded in his answer the ordinary plea of *not guilty* whereby he claimed title to and possession of, said land. He also pleaded a title under a grant from the Spanish government. From the said description of said land given in said petition filed by the Attorney General it appears conclusively that the land in controversy is within the territory described in section first of said Act of September 9th, 1901. Upon the trial of said cause in the district court the Attorney General on behalf of the state introduced in evidence the judgment of the district court of Webb County, Texas, rendered on the 8th day of January, 1862, in the cause entitled Daniel Ruggles vs. The State of Texas, (Trans. p. 14.) This judgment recites among other things, that "it appeared to the court that some time previous to the year 1804 the government of Spain granted to Joaquin Galan a certain large tract of land situated on the east bank of the Rio Grande, embraced within the following boundaries;" the boundaries given describing land embraced within the territory described in said Act of September 9th, 1901. This judgment further recites that "it further appeared to the court by original authentic documents that in the year 1805 said Joaquin Galan sold the said tract of land to one Manuel Garza, who settled upon the same and occupied it for many years, and that about the year 1810 the Government of Spain being desirous of forming a town on the river bank where the said Manuel Garza had planted his said ranch, the said government did then and there condemn and take from said Manuel Garza for the use of the government all that part of said tract of land lying and fronting on the Rio Grande to the depth of six Mexican leagues, and did then and there lay out and establish the town of Palafox on the east bank of the Rio Grande with its exidos extending across the same and donated the lands above and below the said town to the settlers of the same in the form of or shape of porciones running back for a depth of six Mexican leagues or 30,000 varas." The said judgment then proceeds to confirm the title of said Daniel Ruggles to all of the land described therein except that portion of the same that was expropriated by the Spanish government and donated to the settlers of Palafox. It further appears from the petition of the State filed in the trial court in this suit, that the land claimed by the state is a part of the identical land that was expropriated, according to said judgment, by the Spanish government and donated to the settlers of Palafox. It thus conclusively appears from the pleadings of the state in this suit and from the evidence introduced in her behalf, that the title to the land in controversy is a title "emanating or claimed to have emanated from the Spanish

or Mexican government, and having its origin at such time as to be and being within the protection guaranteed by the treaty of Guadalupe Hidalgo entered into between the United States and Mexico," in the language of said Act of September 9th, 1901, and plaintiff in error by his answer, filed in said suit, claimed title to and possession of said land in controversy, by which plea plaintiff in error, the defendant in said suit, claimed a right, title and privilege under a treaty of the United States and the decision of said district court of Travis county and the decision of the Supreme Court of Texas affirming the same, were against the right, title and privilege thus set up and claimed by plaintiff. It, therefore, appears that both the pleadings of the plaintiff and defendant in the trial court show that this suit is one arising under the laws of the United States and a treaty made by the United States, it should have been removed to the Circuit Court.

The third and fourth assignments of error involving the same propositions of law will be considered together.

Third Assignment of Error.

The said Supreme Court erred in affirming the judgment of the trial court in overruling the plea of plaintiff in error to the jurisdiction of the trial court.

Fourth Assignment of Error.

The said Supreme Court erred in affirming the judgment of said trial court holding that the district court of Travis County had jurisdiction to try this action of trespass to try title to the land in dispute which is situated in Webb County, Texas, and not in said Travis County, Texas.

Third Proposition Under the Third and Fourth Assignments Of Error.

The jurisdiction of a state court in so far as it is fixed by the constitution of the state is not subject to the regulation or control of the legislature.

Statement.

This suit was brought in the district court of Travis County, Texas. Plaintiff in error, the defendant therein, in a due order of pleading, and before answering to the merits, filed his plea to the jurisdiction of the court, alleging that the land in dispute was situated in Webb County, Texas, and that the district court of Travis County did not have jurisdiction over the subject matter of the suit, (Trans. p. 6.) The court

refused to sustain this plea, overruled the same, and took jurisdiction of the cause, (Trans. p. 11.)

Webb County and Travis County are situated in different judicial districts.

Authorities.

Constitution of the State of Texas, Art. 5, Sec. 7 and Sec. 8.
Sayles Revised Statutes of Texas, Vol. 1, Art. 22.
Subdivisions 26 and 40, (Judicial Districts.)
Ex Parte Towles, 48 Tex. Rep. 414.
Ex Parte Whitelaw, 59 Tex. Rep. 273.

Argument.

Sections 7, 8 and 22 of Article 5 of the Constitution of Texas are as follows, viz:

Sec. 7. "*The state shall be divided into as many judicial districts as may now or hereafter be provided by law, which may be increased or diminished by law. For each district there shall be elected by the qualified voters thereof, at a general election, a judge,* who shall be a citizen of the United States and of this state, who shall have been a practicing lawyer of this state or a judge of a court in this state for four years next preceding his election; *who shall have resided in the district in which he was elected for two years next preceding his election; who shall reside in his district during his term of office;* who shall hold his office for the period of four years, and shall receive for his services an annual salary of two thousand five hundred dollars, until otherwise changed by law. *He shall hold the regular terms of his court at the county seat of each county in his district at least twice in each year, in such manner as may be prescribed by law.* The legislature shall have power by general or special laws to authorize the holding of special terms of the court, or the holding of more than two terms in any county for the dispatch of business. The legislature shall also provide for the holding of district court when the judge thereof is absent, or is from any cause disabled or disqualified from presiding. The district judges who may be in office when this amendment takes effect shall hold their offices until their respective terms shall expire under their present election or appointment.

Sec. 8. *The district court shall have original jurisdiction* in all criminal cases of the grade of felony; in all suits in behalf of the state to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; *of all suits for trial of title to land and for the en-*

forcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; of all suits, complaints, or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections; and said court and the judges thereof shall have power to issue writs of habeas corpus, mandamus, injunction, and certiorari, and all the writs necessary to enforce their jurisdiction. The district court shall have appellate jurisdiction and general control in probate matters over the county court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the account of executors, administrators, and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and administrators, guardians and minors, under such regulations as may be prescribed by law. The district court shall have appellate jurisdiction and general supervisory control over the county commissioners' court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution, and such other jurisdiction, original and appellate, as may be provided by law."

An analysis of the above provisions of the Constitution of Texas will show clearly; first, that the state shall be divided into judicial districts; second, that the judge shall reside in his district during his term of office; and third, that the district court of each district should have original jurisdiction of all suits for trial of title to land situated in the district. The framers of the Constitution by the use of the words "*the* district court shall have original jurisdiction" certainly did not mean that *any* district court should have jurisdiction to try title to lands situated in any part of the state. If it did not mean this, then the legislature had no constitutional authority to enact a special law by which titles to lands situated in Webb County in one judicial district, could be tried by the district of Travis county, which is another and remote judicial district.

The sixth and seventh assignments of error involving the same proposition will be considered together.

Sixth Assignment of Error.

The said Supreme Court erred in holding that the judgment

of the district court of Webb County, Texas, rendered and given on March 13th 1872 in the cause entitled Daniel Ruggles v. The State of Texas is a void judgment.

Seventh Assignment of Error.

The said Supreme Court erred in not holding that the State of Texas is estopped from ~~of~~ setting up title to the land in dispute by the said judgment of the district court of Webb County of March 13, 1872.

Proposition Under the Sixth and Seventh Assignments of Error.

The judgment of the district court of Webb County of March 13, 1872 in the cause entitled Daniel Ruggles v. The State of Texas is a valid judgment or at least an irregular and voidable judgment and the State of Texas is bound by it and cannot impeach it in this collateral proceedings.

Statement.

The certified copy of the minutes of the District Court of Webb county shows that on Jan. 12, 1861, there were pending in that court two cases, each entitled Daniel Ruggles v. The State of Texas, one being numbered 11 and the other 14. (Trans. pp. 13 and 14.) The original papers in these cases, according to the testimony of the clerk of court, have all been lost. (Trans. p. 13.) On Jan. 8, 1862, that court rendered a judgment in a cause entitled Daniel Ruggles v. The State of Texas, no number being given, by which ~~each~~ it was ascertained and adjudicated that the government of Spain granted to Joaquin Galan some time before 1804 a large tract of land on the east bank of the Rio Grande in Webb county, giving the metes and bounds of the same, which embrace only the Palafox tract of land as delineated on the plat on page 20 of the transcript. See Trans. pp. 14 and 15 for copy of this judgment.

After the rendition of this judgment Daniel Ruggles, the plaintiff in the suit, on Jan. 10, 1862, moved for a new trial, which motion was overruled. (Trans. p. 16.) At the June term of the court, 1869, the plaintiff, Ruggles, filed a motion to interpret the judgment of Jan. 8, 1862, which motion was overruled June 23, 1869. (Trans. p. 17.) At the December term, 1870, of the court, two cases entitled Daniel Ruggles v. The State of Texas, numbered 16 and 17, each for trespass to try title, were dismissed for want of jurisdiction; and on March 8, 1872, the same cases were reinstated and docketed. (Trans. pp. 17 and 18.) On March 9, 1872, a judgment overruling a motion to review and correct the judgment of Jan. 8,

1862, was rendered. (Trans. p. 18.) On March 12. 1872, in a cause entitled Daniel Ruggles v. The State of Texas, the court rendered a judgment setting aside and annuling the said judgment of Jan. 8, 1862. (Trans. p. 24.)

After entering this judgment and an order changing the numbers of the cases on the docket from Nos. 16 and 17 to Nos. 11 and 14, which the order recites were the original numbers, and another order consolidating the two cases, the court rendered the judgment of March 13, 1872, confirming the title to the entire grant, including all the the land embraced in the Palafox and Balconcitas tracts to Joaquin Galan, his heirs and legal assigns. (Trans. pp. 25, 26 and 27.)

This judgment of March 13, 1872, confirmed the title of Daniel Ruggles to all the land embraced in the two suits brought by him in 1860 as shown on the plat on p. 20 of the transcript, including the Palafox tract and the Balconcitas tract. The judgment recites that the cause in which it was rendered was submitted to the court under the provisions of an Act of the Legislature of this State entitled 'An Act to ascertain and adjudicate certain legal claims for lands against the State situated between the Nueces River and the Rio Grande," approved Feb. 11, 1860. Trans. p. 25.

Sections 1, 3 and 11 of said Act of the Legislature are as follows: "Sec. 1. Be it enacted by the legislature of the State of Texas, that any person who may be the original grantee. heirs or legal assign, of any grant of land emanating from the Spanish or Mexican government, and having its origin previous to the nineteenth of December A. D. 1836 and situated between the Nueces and Rio Grande rivers, and below a line drawn from the upper boundary of Webb county to the mouth of the Moros creek emptying into the Nueces river, may file his petition in the district court of the county in which the said land may be situated which petition shall be filed at least ten days before the time of holding of said district court, and shall contain a full description of the land claimed, setting forth particularly, its situation, boundaries and extent, and shall accompany such petition with the titles or evidences of titles or right under which the same is held or claimed; and the said district court shall investigate the same in accordance with the laws of nations, the laws, usages and customs of the government from which the claimed is derived, and the principles of equity, so far as the same are applicable, and shnll give judgment for the confirmation of the same when the title is perfect, or when imperfect, when the same would have matured into a perfect title under the laws, usages and customs of the government under which it originated had its sovereignty over the same not passed to, and been vested

in the Republic of Texas; provided, said title or said imperfect title or right was originally founded in good faith; and provided that no service of such petition shall be necessary.

Section 3. That it shall be the duty of the District Attorney of any district in which any such case may be tried to superintend the interests of the state in the premises, to attend the trial of any such causes, and to file cross-interrogatories when depositions shall be taken.

Section 2. This act shall be limited to the term of three years from and after its passage."

This act was approved the 11th. day of February 1860, (Gammel's Laws of Texas, Vol. 4, p 1471); and was amended by an Act of the Legislature approved January 11. 1862, which amendatory act is as follows: "An Act to amend an act entitled, "An act to ascertain and adjudicate certain legal claims for land against the state, situated between the Nueces and Rio Grande rivers."

Section 1. Be it enacted by the Legislature of the State of Texas, that the eleventh section of the above recited act shall continue in force until the 11th. day of February A. D. 1865 and no longer."

The State appealed from this judgment of March 13, 1872 but the appeal was dismissed (Trans. p. 29.)

Authorities.

Gammels Laws of Texas, Vol. 4, p. 1471 and Vol. 5, p. 568.
Kenedy v. Jarvis *et als*, 1 S. W. R. 191;
Buchanan v. Bilger, 64 Tex. 589;
Johnson v. Loop, 2 Tex. 331;
Stephens v. Stephens, 62 Tex. 337;
Murchison v. White, 54 Tex. 78;
Freeman on Judgments, Sections 96, 67, 100 and 101, Vol. 1;
Black on Interpretation of Laws pp. 99, 100, 104, 212.

Argument.

The judgment of the District Court of Webb county of March 13, 1872, has been the subject of construction and adjudication by the Supreme Court of Texas in two cases. In Kenedy v. Jarvis *et al.*, 1 S. W. R. 191, it was held to be a valid judgment; in Tex. Mex. Ry. Co. v. Jarvis, 80 Tex. 456, it was held to be a void judgment. The question of its validity under these circumstances, may still be regarded as an open one. In Kenedy v. Jarvis the court after reviewing all the facts disclosed by the record that lead up to the judgment,

entered into an elaborate argument establishing its validity. It would be difficult to add anything to that argument and it is submitted to the court as an able presentation of the question. The Supreme Court in Tex. Mex. Ry. Co. v. Jarvis decided that this judgment is void on the ground that the District Court of Webb county had lost jurisdiction of the subject matter of the suit long before the date of the judgment; holding that the Act of the Legislature of February 11, 1860, which authorized the suit, and the Act of January 11, 1862, amendatory thereof, absolutely prohibited the court from entering any order or decree after the 11th day of February, 1865, in any suit instituted thereunder, although it might have been commenced long prior to that date. But it will be found on examination that neither the Act itself nor its amendment, expressly or by implication, contains any such prohibition.

Besides, the judgment of the court in Tex. Mex. Ry. Co. vs. Jarvis et al., was a collateral proceeding, to which neither the State of Texas nor plaintiff in error was a party. Both of these suits for confirmation of title, which were consolidated and resulted in the judgment of March 13th 1872, were commenced within three years of the passage of the Act of 1860; and they remained on the docket of the court up to the time of the rendition of the judgment. It is insisted by plaintiff in error that the suits having been properly begun, and within the time specified by the Act of 1860, a valid judgment could be rendered after the 11th day of February 1865, the date fixed by the amendment, up to which the act of 1860 should continue in force. It is insisted that this limitation of time operated only to limit the time within which a suit could be brought against the State and did not operate to limit the time within which cases already and properly pending could be tried and decided. Under the construction given to this act and its amendment by the Supreme Court in Tex. Mex. Ry. Co. v. Jarvis, a suit could have been legitimately commenced for the confirmation of a complicated Mexican title on the 9th day of February, 1865, but it had to be entirely finished before the 11th of that month; that is to say, it had to be finished before the expiration of the time allowed by law for filing answer after service of citation. That construction certainly leads to this absurdity. Moreover, under that construction, if a case had reached final judgment against a plaintiff before February 11, 1865, and he had appealed and the cause had been docketed in the Supreme Court, that court after February 11, 1865, could not have rendered any judgment in the case, although the press of other business before the court had prevented an earlier judgment, and although the Supreme Court might have considered the judgment of the lower court

obviously incorrect and unjust. Such construction of the act of 1860 leads not only to these absurdities but it renders nugatory the provisions of the act and prevents the accomplishment of the very ends designed by the act.

The fifth and ninth assignments of error involving the same proposition will be considered together.

Fifth Assignment of Error.

The said Supreme Court erred in holding that the Act of the Legislature of the State of Texas of April 4, 1881, did not ratify, validity and confirm the judgment of the district court of Webb county of March 13, 1872, rendered in the cause entitled Daniel Rnggles v. The State of Texas.

Ninth Assignment of Error.

The said Supreme Court erred in not holding that said act of the legislature of April 4th, 1881, is a legislative grant or release of all rights, title and interest that the State of Texas ever had in and to the said land in dispute.

Proposition Under the Fifth and Ninth Assignments of Error.

By the Act of the Legislature of Texas, approved April 4th, 1881, the State of Texas recognized the validity of the judgment of the district court of Webb County of March 13, 1872. in the cause entitled Daniel Ruggles v. The State of Texas; and said act ratified and confirmed said judgment and operates as a grant from the state of the land in controversy to plaintiff in error or to those under whom he claims and further operates to estop the State from now claiming said land.

Statement.

Section 1, of the Act of the Legislature, approved April 4, 1881, and entitled an Act to authorize and require the issue of patents to lands situated between the Rio Grande and Nueces rivers, the title to which have been confirmed under the Act of February 11, 1860, is in the following language:

"Section 1. Be it enacted by the Legislature of the State of Texas that whereas many suits to confirm land titles for land between the Nueces and Rio Grande rivers were brought within three years from and after the passage of the Act of February 11th, 1860 and in compliance with the terms thereof, but, owing to the war and other causes, were not finally adjudicated until after such three years had expired; and whereas the Commissioner of the General Land Office has refused to issue patents for titles not confirmed within such three years; and whereas it is just and equitable that parties

who in good faith and diligence, have attempted to comply with the terms of said Act, should receive the full benefit thereof; therefore the Commissioner of the Land Office is hereby authorized and required to issue patents to all lands between said rivers when suits to establish title to same under said act have been commenced within three years from the passage of the same and when the proper District Court has finally confirmed such titles." (Trans. p. 33.)

Authorities.

Turner v. Rogers, 38 Tex. Rep. 582;
Sanders v. Hart, 57 Tex. Rep. 8;
May v. Ramsay, 46 Tex. Rep. 371;
Alexander v. State, 56 Ga. 486;
Enfield v. Permit, 5 N. H. 285;
Heirs of Andre v. Billou, 3 Pick. 224.

Argument.

The provisions of this Act of the Legislature of April 4, 1881, were evidently intended to apply to cases like the judgment of the district court of Webb County of March 13, 1872, for the suits in which that judgment was rendered possess all the requisites of suits described in that Act. The consolidated suits in which it was rendered were commenced under the Act of February 11, 1860; and within three years of the passage of the same; they were for land within the prescribed territory; the proper district court confirmed the title; the suits were not finally adjudicated until after the expiration of three years from the passage of said Act; therefore, the judgment presents a case exactly within the terms of the Act of April 4, 1881. The necessary effect of this Act is to validate every judgment in suits of that description; for unless it does this, it is entirely meaningless.

The Court of Civil Appeals in the case at bar held that this Act of April 4, 1881, did validate this judgment, and I can add nothing to the able argument of that court on this proposition, which will be found on pp. 49 to 53 of the transcript.

The plaintiff in error acquired the land in controversy after the rendition of the said judgment of March 13, 1872, which the State permitted to stand unreversed on the public records, without protest, and without appeal. He also acquired the land after the passage of the said Act of April 4, 1881, relying upon it and the said judgment for title and has paid the State of Texas $4,500 for the taxes assessed by the State. Trans. pp. 18 and 19. All these facts certainly estop the State from now claiming this land.

The tenth and twelfth assignment of errors involving the same proposition will be considered together.

The Tenth Assignment of Error.

The said Supreme Court erred in holding that the judgment of the district court of Webb County of January 8th, 1862, in the cause entitled Daniel Ruggles v. The State of Texas estopped plaintiff in error from claiming the land in dispute.

The Twelfth Assignment of Error.

The said Supreme Court erred in holding that the said judgment of the district court of Webb County of January 8th, 1862, did not show an outstanding title to the land in dispute in the settlers of the town of Palafox or their heirs and assigns.

First Proposition Under the Tenth and Twelfth Assignments Of Error.

The judgment of the District Court of Webb county of Jan. 8th, 1862, in the cause entitled Daniel Ruggles v. The State of Texas, was introduced in evidence and relied upon by both parties to this suit; the court in that case having jurisdiction of the parties and the subject matter, the recital of said judgment of any fact essential to the rendition of the judgment or without the proof of which it could not have been rendered, is conclusive evidence against the parties to the judgment of the existence of such fact.

Statement.

Both parties to this suit introduced in evidence the judgment of the District Court of Webb County of Jan. 8, 1862. (Trans. pp. 14, 15 and 16.) That judgment recites the facts "*that about the year 1810 the government of Spain being desirous of forming a town on the river bank where Manuel Garza had planted his ranch, the said Government did then and there condemn and take from said Manuel Garza for the use of the Government all that part of said tract of land lying and fronting on the Rio Grande to the depth of six Mexican leagues, and did then and there lay out and establish the town of Palafox on the eastern bank of the Rio Grande with its exidos extending across the same and gave and donated the lands above and below the said town to the settlers of the same in the form or shape of porciones and that for said condemnation the said Manuel Garza was reimbursed in lands lying above the town and jurisdiction of Palafox.*" That judgment also recited '*that it further appeared that the jurisdiction*

of Palafox extended five leagues above and the same distance below the center of the plaza of the said town."

The plat on p. 20 of the transcript shows the location of the town of Palafox and the portion of the plat colored blue shows the location of the land in dispute, which is included in the limits of the porciones, which said judgment recited were given and donated to the settlers of the town of Palafox (Testimony of Dario Sánchez, Trans. p. 20; also plat on p. 59 of transcript.)

Authorities.

Tex. Mex. Ry. Co. v. Jarvis, 80 Tex. 457;
Watson v. Hopkins, 27 Tex. 637;
Swearingen v. Glenn, 34 Tex. 243;
Foster v. Wells, 4 Tex. 101;
Lee v. Kingsbury, 13 Tex. 68;
Tadlock v. Eccles, 20 Tex. 783;
Hatch v. Garza, 22 Tex. 176;
Cook v. Burnley, 45 Tex. 97;
Burford v. Rosenfield, 37 Tex. 42;
Fristoe v. Leon and H. Blum, 92 Tex. 76;
The State of Texas v. J. A. Ortiz, et al. Tex. Sup. et. Feb. 12, 1906.

Argument.

If it should be held that the judgment of the District Court of Webb County of March 13, 1872, is void; then it must be held that the judgment of Feby. 8, 1862 is valid. The state admits its validity; introduces it in evidence and relies upon it. The question then arises were these recitals in the judgment in reference to the expropriation of the land and the re-granting of it to the settlers of Palafox, the recitals of such facts as must have been proved before such a judgment could be rendered. A mere inspection of the judgment will show that they are of that nature; for without the proof of them; in fact without the recital of them in the judgment, it would be entirely meaningless. That suit was brought to secure the confirmation of title to the entire Galan grant; and the judgment near the commencement gives the boundaries of that grant and adjudicates the fact that such grant was issued; it then proceeds to confirm Joaquin Galan, his heirs and assigns the title to *a part* only of the land embraced in the grant. If the judgment had stopped there it would have been incomplete; it would have failed to adjudicate the entire issue; it would not have responded to the pleadings. It was necessary, therefore, in order to make the judgment intelligible and

responsive to the issues and the pleadings to recite the facts proved upon the trial that justified the court in confirming the title *to a part and not to all of the land.* These recitals are binding upon the State of Texas, for she was a party to that suit; the facts recited cannot now be denied or questioned by her in this collateral proceeding, for she acquiesced in that judgment.

These facts prove that at the time of the rendition of the judgment the state had no right or title to or interest in any of the lands embraced within the limits of the Palafox tract of the Galan grant. They proved that at that time, the title to that portion of the land involved in this case at bar was outstanding in the settlers of the town of Palafox, their heirs or assigns. The state on the trial of the case at bar made no effort to prove that she has acquired these lands in dispute since the rendition of the judgment proving that outstanding title. How, then, could a judgment for the land be legitimately rendered in her favor? If it is maintained that it was incumbent upon defendant to prove that the land in dispute in this case was granted to private persons after its expropriation, then I reply, *first*, that the judgment itself is unimpeachable evidence of that fact; *second*, that the long possession of defendant and those under whom he claimes raises against the state the presumption of such a grant; and, *third*, that the deeds in defendants chain of title show a title derived from a settler of the town of Palafox and they convey land embraced within the *porciones*. Trans. p. 22.

The Supreme Court of Texas in its judgment overruling the motion for a rehearing (Trans. p. 81) held that the recital in this judgment that the land after its expropriation was given and donated to the settlers of the town of Palafox, was "the recital of an immaterial fact, which derives no force from being stated in the judgment." It is a universal rule that a judgment is conclusive by way of estoppel as to all facts without the existence and proof or admission of which, it could not have been rendered. The judgment itself recites the fact that "it appeared to the court from original authentic documents" that the land was expropriated and thereafter granted to the settlers of the town. The facts of expropriation from Manuel Garza and regrant to the settlers, was a fact which it was necessary to prove in order for the state to show that Daniel Ruggles who claimed under Manuel Garza, was not entitled to recover all the lands for which he had brought suit. It would be difficult to conceive of facts more material than these for they form a part of the very foundation and basis of the judgmeut. Since the rendition by the Supreme Court of Texas of its said judgment overruling the motion for a

rehearing and holding that these facts were immaterial to the rendition of the judgment, they have had the recitals in this judgment under consideration in another case entitled The State of Texas, Plaintiff in error v. J. A. Ortiz et al, Defendant in error, in which the opinion of the court was delivered on February 12, 1906, and has not yet been reported. In this last mentioned case Ortiz et al relied on the recital in the said judgment that after the expropriation of the land from Manuel Garza, "for said condemnation the said Manuel Garza was reimbursed in lands lying above the town and jurisdiction of Palafox." The Supreme Court of Texas held that this recital of the judgment is evidence of the fact that Manuel Garza was granted the land to the north of and adjoining the Palafox tract, called the Balconcitas tract. It should be specially noted that the recitals in the judgment, *first*, that the land was expropriated, *second*, that after its expropriation it was given and donated to the settlers of the town and *third*, that Manuel Garza was reimbursed in other land to the north, are all in one sentence in the judgment. Therefore, the Supreme Court of Texas holds in one case that the recital in one sentence of the judgment that the land after expropriation was granted to the settlers of Palafox is immaterial and evidence of nothing; but that the recital in the same sentence that after the expropriation, Manuel Garza was granted other land to the north, is material and evidence of the grant to Manuel Garza. The recital that the land after expropriation was given to the settlers, was a recital in reference to the land involved in that suit and recital affecting the interest of a party thereto, Daniel Ruggles; but the recital that after the expropriation, Manuel Garza was granted other land to the north, was a recital in reference to land not involved in that suit and a recital affecting the interest of a person, Manuel Garza, not a party to the suit. It is certainly difficult to understand, if not inexplicable, how a recital bearing upon matters and parties involved in a suit, should be immaterial and no evidence of the facts recited, and yet a recital in the same sentence bearing upon matters and parties not involved in the suit, should be material and full evidence of the facts recited. This decision of the Supreme Court of Texas in Ortiz et al v. The State should be regarded by this court as a reversal of their opinion in the case at bar. This recital of outstanding title in the settlers of the town of Palafox established the plea of outstanding title urged by plaintiff in error in his answer in the trial court. Plaintiff in error proved by the recitals in the deeds in his chain of title that he claimed and was in possession of a part of this very *porcion* land that was granted to the settlers of Palafox as recited in the judgment.

(Trans. p. 22.) He thus connected himself with this outstanding title. But he was not bound to this, for the grant to the settlers being a legal title, under the uniform decisions of the Supreme Court of Texas; the defendant in an action of trespass to try title is not bound to connect himself with an outstanding legal title in order to defend under it.

The Fourteenth Assignment of Error.

The said Supreme Court erred in not holding that the adverse possession of said land under a claim of right by plaintiff in error and those under whom he claims for so great a period of time under the Spanish government, the Mexican government and the State of Texas, raised a presumption of a grant from the State of Texas, by which the State is estopped from now claiming said land.

Proposition Under the Fourteenth Assignment of Error.

The adverse and uninterrupted possession of plaintiff in error and those under whom he claims for such a great period of time, of the land in dispute, under claim of right and title, derived from the Spanish government and recognized by the Mexican government and Republic of Texas, raises a presumption of a grant; and the title of plaintiff in error is, consequently, such a title as is and ought be protected by the courts of the United States under the terms of the treaty of Guadalupe Hidalgo.

Statement.

The defendant introduced in evidence a regular chain of title to the land in dispute, commencing with the power of attorney from Joaquin Galan to his son, dated Dec. 11, 1804. (Trans. p. 21.) This deed, together with nearly every other deed in the chain of title, refers to the grant of land made by the government of Spain to Joaquin Galan about the year 1767. (Trans. pp. 21, 22 and 23.) The State of Texas by the Act of the Legislature approved Feb'y. 10, 1852, entitled "An Act to relinquish the right of the state to certain lands therein named," recognized the existence of the town of Palafox, its jurisdiction and the division of the lands in its jurisdiction into *porciones* All of the deeds in said chain of title transfer *porcion* land, except that from Jose Galan, attorney in fact, to Manuel Garza, which conveys the entire grant. The land in dispute was purchased by Daniel Ruggles in 1855. (Trans. pp. 22 and 33.) He occupied it by his tenants and in 1876 sold it to parties who conveyed to defendant in 1881. (Trans. pp. 22 and 23.) Defendant has been in the adverse possession

of the land from 1881 to the present time. (Trans. pp. 18 and 19.) He paid about $8,000 for it without knowledge or notice of any claim of the state. (Trans. p. 19.) He has paid to the state about $4,500 for taxes assessed against the land during his period of possession. (Trans. p. 19.)

Authorities.

Smith v. State of Maryland 6 Cranch 286.
United States v. Chavez, 159 U. S. R. 452;
Tex. Mex. Ry, Co. v. Locke, 74 Tex. Rep. 370;
Haynes v. State of Texas, 11 Tex. Court Reporter 885;
State v. Russell, 11 Tex. Court Reporter 435;
Strother v. Lucas, 12 Pet. (U. S.) 435;
Ortiz v. State of Texas, 12 Tex. Court Reporter 476;
The State v. Ortiz, 14 Tex. Court Reporter, p. 883.
Baldwin v. Goldfrank, 88 T. 257.
Mc Knight v. Hunter's Lessee 1 Wheat. 304.

Argument.

The evidence in this case, without reference to the two judgments of the District Court of Webb County, is sufficient to raise the presumption of a grant of the land in dispute from the government of Spain to Joaquin Galan about the year 1767. It is legitimate to consider the recitals of ancient deeds in cases of this kind and the power of attorney from Joaquin Galan to Jose Galan, his son, dated Dec. 11, 1804, and the deed from Jose Galan, attorney in fact, to Manuel Garza dated May 13, 1805, are both archives of the General Land Office and contain recitals of such a grant having been made. (Trans. p. 32.) It is evident that these lands were occupied at a very early date for grazing purposes, for the legislature by said Act of Feb'y. 10, 1852, recognized that the town of Palafox once existed by releasing claim of the state to certain *porciones* within its jurisdiction. Under the Spanish laws and customs such *porciones* of land were granted only to actual settlers and for agricultural and pastoral purposes. It is then a legitimate inference from the evidence that this *porcion* land was occupied long prior to 1852. It was occupied by Daniel Ruggles by his tenants and he obtained his title in 1856, and conveyed it in 1876. Defendant deraigns title through Daniel Ruggles and has himself been in possession of the land for more than twenty years. The facts show that the land in dispute has been in the possession of the defendant and those under whom he claims for a great period of time—certainly more than fifty years—and very probably ever since 1805, when it was conveyed to Manuel Garza. And this possession has been held during all that time under a claim of right and title. This long period of possession—nearly one

hundred of years—can be legitimately regarded as raising the presumption of a grant of this land by some one of the sovereignties, which successively held this territory during that time—Spain, Mexico, The Republic of Texas or The State of Texas; and this presumption will operate to transfer the title out of the state and bar her right of recovery. Under the laws of Texas as enunciated by the Supreme Court, possession of land is not an indispensable requisite to the presumption of a grant [illegible] against the State, (Baldwin v. Goldfrank, 88 T. 257; Ortiz v. The State of Tex., Court Reporter, Vol. 12 p. 479.) But plaintiff in error went further and proved a title by record and by possession that raises the presumption of a grant; and the title so established is protected by the treaty of Guadalupe Hidalgo, Article 8, and by the 2d. subdivision of the Protocol signed at the time of the ratification of the treaty.

Said Article 8 of the treaty is as follow, viz:

"Art. VIII. Mexicans now established in territories previously belonging to Mexico and which remain for the future within the limits of the United States, as defined by the present Treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax or charge whatever.

Those who shall prefer to remain in said territories, may either retain the title and rights of Mexican citizens or acquire those of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty, and those who shall remain, in said territories, after the expiration of that year, without having declared their intention to retain the character of Mexican, shall be considered to have elected to become citizens of the United States.

In said territories, property of every kind, now belonging to Mexicans not established there, *shall be inviolably respected.* The present owners. the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guatantees equally ample as if the same belonged to citizens of the United States."

The 2d. subdivision of the Protocol is as follows, viz: "The American Government by supressing the Xth article of the Treaty of Guadalupe did not in any way intend to aunul the grants of land made by Mexico in the ceded territories. Those grants, notwithstanding the suppression of the article of the treaty, preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowl-

edged before the American tribunals. Conformably to the law of the United States, legitimate titles to every description of property personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law in California and New Mexico up to the 13th of May 1846, *and in Texas up to the 2d day of March 1836*."

In the case of the United States v. Chávez, (159 U. S. 452,) which is in many respects similar to the case at bar the Supreme Court of the United States in its opinion announced the law upon the subject as follows, viz: "We have no difficulty in holding that the question is whether the land in controversy was the property of claimants before the treaties (Guadalupe Hidalgo and Gadsden) and, if so, that its protection is guaranteed by the treaties as well as the laws of nations. Nothing, it is true, can be claimed by prescription, which owes its origin to and can only be had by matter of record; but lapse of time accompanied by acts done or other circumstances, may warrant the jury in presuming a grant or title by record. Thus also though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeable to the maxim *nullum tempus occurrit regi;* yet if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement after many years of uninterrupted possession or enjoyment. Accordingly royal grants have been thus found by the jury, after an indefinitely long continued peaceful enjoyment, accompanied by the usual acts of ownership. Finally the law of nations that private property in the territory ceded by one nation to another, when held by title vested before the act of cession should be respected; the express provisions to that effect in the treaty between Mexico and the United States; the evidence of the fact of a grant legal under the forms of Mexican law, and of a juridical possession given thereunder and the strong presumptiou growing out of an exclusive and uninterrupted possession and enjoyment of more than half a century bring us to concur in the decree of the court below."

The State of Texas in the case at bar put in issue a title of the Spanish government, protected or claimed to be protected by the treaty of Guadalupe Hidalgo both by said act of the legislature, which authorized the suit, and by the description of the land in her petition in the trial court. Her own evidence, the said judgment of the district court of Webb county of January 8, 1862, shows that the land was granted by the Spanish government prior to the year 1804, that it was expropriated by the Spanish government about the year 1810 and re-granted to the settlers of the town of Palafox. *There is not one particle of evidence that the State of Texas ever acquired*

the title after the grant to the settlers of Palafox. Plaintiff in error claims under this grant from the Spanish government; he claims to have whatever title the settlers of the town of Palafox or any of them ever had to the land in dispute; he produces in evidence deeds conveying a part of the very land that was granted to the settlers; he proves possession and enjoyment of the land for more than fifty years by himself and those under whom he claims; he proves a purchase of said lands and the payment of a large consideration therefor, after the rendition of the said judgment ~~of Webb county~~ of March 13, 1872 against the state and after the passage of the Act of April 4th 1881 by her legislature validating by description that judgment and he proves payment to the state of thousands of dollars for taxes assessed by the state against said land. All the evidence shows that the land is situated in territory ceded by Mexico to the United States by the treaty; and the title claimed by plaintiff in error in a ligitimate title in every respect in view of the terms of the protocol. We thus have a case almost parallel with the case of the United States v. Chávez above cited. It is a suit growing out of a treaty of the United States. It involves a Mexican or Spanish title which under that treaty should be "inviolably respected," and in all things protected by this court against confiscation by the State of Texas by judicial process.

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